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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 464.

CLAYTON MARK & COMPANY, ENAMELED METALS COMPANY, FRETZ-MOON TUBE COMPANY, INC., JAMES M. BARTON, GENERAL ELECTRIC COMPANY, LACLEDE STEEL COMPANY, THE M. B. AUSTIN COMPANY, NATIONAL ELECTRIC PRODUCTS CORPORATION, I. A. BENNETT, REPUBLIC STEEL CORPORATION, SPANG CHALFANT, INC., H. G. MORROW, STEELDUCT COMPANY, TRIANGLE CONDUIT & CABLE CO., INC., and THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Petitioners,

—against—

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION OF CHAMBER OF COMMERCE OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE.*

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BURTON A. ZORN,
EDWIN P. KAUFMAN,
On the Brief.

March 25, 1949.

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Petitioners,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Motion for Leave to File Brief as *Amicus Curiae*.

MAY IT PLEASE THE COURT, the undersigned, as counsel for Chamber of Commerce of the State of New York, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

The consent of counsel for the petitioners to the filing of this brief has been obtained.

The Solicitor General of the United States has authorized the undersigned to state that he has no objection to this application.

Chamber of Commerce of the State of New York is a corporation organized pursuant to the laws of the State of New York in the year 1784. Its incorporation in the State of New York followed the Revolutionary War and, prior to that War, the organization, then known as "Chamber of Commerce of the City of New York in America", was an incorporated body operating under a charter granted by King George III of England in the year 1770. The Chamber was founded by a small group of merchants in New York City in 1768.

Chamber of Commerce of the State of New York was originally organized for the purpose of promoting and encouraging commerce, supporting industry and adjusting disputes relative to trade and commerce. Its purposes have continued the same throughout its long history. Its membership has been and is composed of businessmen engaged in virtually all forms of commerce and trade.

Chamber of Commerce makes this motion for leave to file the accompanying brief as *amicus curiae* for the reason that the subject matter involved in this case—to wit, delivered pricing practices in American business today—is of the greatest importance to the commercial and business community of the United States. The Chamber finds a compelling current need for clarification of the rights of businessmen to

formulate prices in a manner not inconsistent with the public welfare, to the end that businessmen's actions entered into in good faith and without collusion or conspiracy will be lawful and beyond Governmental suspicion or legal attack.

Other special reasons in support of this motion are set forth in the accompanying brief.

Dated: New York, N. Y., March 25, 1949.

JULIUS HENRY COHEN,
Counsel, Chamber of Commerce of the State of New York, *Amicus Curiae.*

IN THE

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Petitioners,

—against—

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, *AMICUS CURIAE.*

Statement of the Case.

In a competitive society which places a premium upon the freedom of its members to engage in commerce without restraint, except where the Legislature specifically establishes restraints, action by a Federal administrative agency, contrary to Congressional purpose, which interferes with, limits or forecloses commercial freedom, is necessarily unlawful.

In this case, the Court is reviewing just such an unwarranted restraint on commercial freedom.

The Federal Trade Commission has, in effect, here ruled,* and the Court of Appeals for the Seventh Circuit has concurred†, that, in the absence of any charge of violation of Section 2 of the Clayton Act, no one may sell his products in interstate commerce at a delivered price independently determined, without agreement, combination or conspiracy with his competitors, without facing prosecution under Section 5 of the Federal Trade Commission Act—simply because his competitors price their products similarly and he knew that fact when he established his delivered price.

Not only is this ruling by the Federal Trade Commission premised on no statutory authority and, therefore, illegal, but it is based, as we hereinafter show, upon an unrealistic and erroneous conception of the practical realities of the market place. The necessary practical effect of the Commission's ruling is to eliminate, by administrative fiat, the very free and open competition which the Federal Trade Commission is charged with safeguarding and fostering.

Position as *Amicus Curiae.*

Chamber of Commerce of the State of New York files this brief as *amicus curiae* in protest against Paragraph V of the Federal Trade Commission's order made pursuant to Count II of its complaint which charged that, irrespective of combination, the

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* *Matter of Rigid Steel Conduit Association, et al.*, 38 F. T. C. 534 (1944).

† *Triangle Conduit & Cable Co.* v. *Federal Trade Commission*, 168 F. (2d) 175 (1948).

individual and independent use by respondents* of a basing-point method of selling conduit was unlawful. This portion of the order embodies the theory that the individual use by a seller of a basing-point method of pricing is an unfair method of competition if adopted with knowledge that other and competing sellers use the same sales method.

The order was made by the Commission under purported authority of Section 5 of the Federal Trade Commission Act [15 U. S. C. § 45] by which "unfair methods of competition in commerce * * * are * * * declared unlawful" and by which the Commission "is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce * * *."

The Legal Issue.

The issue presented to this Court may be simply stated:

> Is it unlawful under Section 5 of the Federal Trade Commission Act for a seller to adopt—independently, without agreement, combination or conspiracy—a basing-point method of pricing and selling with the knowledge that other and competing sellers are using the same method of pricing and selling?

We submit the answer must be in the negative.

In this brief, we address ourselves solely to the economic realities of the market place which the Commission has completely ignored.

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* Petitioners herein.

We have considered and reviewed the brief filed herein by the petitioners and find no reason to reiterate the views as to the law therein expressed, with which we wholeheartedly concur.

It is our major premise that only Congress, if it so decides, has the authority to disrupt the traditional marketing practices developed and expanded in our free economy over the past 173 years—that power to achieve such far reaching consequences has not been vested in the Federal Trade Commission.

The Confusion of Business Today.

As the result of recent activity by the Federal Trade Commission, which has received the unwavering support of the courts until now, business is in a perplexing state of confusion. Business now operates within a complicated framework in which the demarcation between innocence and guilt is either undefined or vaguely drawn.

Thus, business has been compelled to redefine its concept of "price" for, according to the explicit statement of the Federal Trade Commission* and the implicit comment of this Court,** "price" no longer means the amount a buyer must pay for a commodity but, rather, the net which the seller receives back at his mill after the sale—even though Congress expressly rejected this definition of "price" in adopt-

* Statement of Federal Trade Commission Policy Toward Geographic Pricing Practices for Staff Information and Guidance, Issued Oct. 12, 1948; corrected Oct. 21, 1948.

** *Corn Products Refining Co., et al.* v. *Federal Trade Commission*, 324 U. S. 726 (1945); *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., et al.*, 324 U. S. 746 (1945).

ing the Robinson-Patman Amendment to the Clayton Act.*

Further, business has found that, under the Clayton Act, it is virtually foreclosed before the Federal Trade Commission, and starkly guilty, if there be but a "reasonable *possibility*" that discounts in price may adversely affect competition. This results from this Court's decision in the *Morton Salt* case,** last term, which, if we adopt the language of Mr. Justice Jackson there dissenting, would establish the law that no discount is valid "if the Commission chooses to say it is not".†

And now, the businessman is told that if, in order freely to compete in various markets throughout the country, he adopts a particular method of pricing with knowledge that his competitors engage in similar practices, he is guilty of violating the law.

The development of these three propositions, advocated by the Federal Trade Commission, contrary, we submit, to clear Congressional intent, has already produced a condition of uncertainty and confusion in business practice, and if sustained, will undoubtedly produce staggering dislocations in our economy wholly inconsistent with the long established Congressional philosophy of free and vigorous competition.

The confusion now rampant in this area of legal doubt has been recently loudly voiced in the hearings conducted by a sub-committee of the Senate Com-

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* See 80 Cong. Rec. 8223-4, 7760, 8122, 8126-7, 8130 (1936).

** *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948).

† Ibid. at p. 58.

mittee on Interstate and Foreign Commerce.* The interim report of that sub-committee,** only recently published,† clearly pictures the confusion prevailing among businessmen and underscores the current perplexities by demonstrating the confusion existing within the Federal Trade Commission itself. Thus, the sub-committee's interim report states:

> "While varying views are held as to the causes, there is virtual unanimity of opinion that undesirable confusion now exists as to the legality of pricing practices involving freight absorption and delivered price." (p. 45).
>
> * * * *
>
> "Some spokesmen for the Federal Trade Commision favor required f. o. b. mill pricing. As will be shown, however, there is considerable confusion on this question within the Commission and its staff and apparently as a result of this congressional inquiry there has been an effort at the Commission to disown advocacy of required f. o. b. mill selling." (p. 9).

Chamber of Commerce here pleads with this Court for aid in clearing this confusion, this Court's assistance being imperatively necessary to dispel business' present doubts in its own basic rights and to guide the Federal Trade Commission in its duty to foster, and not disrupt, normal and free competitive processes.

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* The hearings were conducted pursuant to S. Res. 241 (80th Congress) and on S. 236 (amendment) and S. 1008 (81st Congress).

** The interim report is entitled "Interim Report on Study of Federal Trade Commission Pricing Policies" [hereinafter sometimes referred to as "The Senate subcommittee's Interim Report"].

† March 11, 1949.

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I.

Unless Paragraph V of the Federal Trade Commission's order is set aside, sellers of standardized commodities will be forced to sell at f. o. b.–mill prices *only*—a result far more likely to promote monopoly than to stimulate competition.

There can be no doubt that, if Paragraph V of the order of the Federal Trade Commission here under review is permitted to stand, the only permissible price available to the seller of a standardized homogeneous product will be an f. o. b.–mill price. Delivered pricing of any type will be outlawed, for freight absorption will be unlawful.

And this case, if the Commission's order is affirmed, will, with the cases which have preceded it,* establish a synthesis of rights in the Federal Trade Commission which will grant to the Commission the power to confine all selling practices to the single f. o. b.–mill price.

Thus to outlaw delivered pricing, to ban freight absorption, to make basing-point pricing unlawful and to compel f. o. b.–mill pricing is the idea solely of the Federal Trade Commission. It is a concept which, despite rejection by Congress,** the Commission has for many years attempted to impose upon

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* *Corn Products Refining Co., et al.* v. *Federal Trade Commission*, 324 U. S. 726 (1945); *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., et al.*, 324 U. S. 746 (1945); *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U. S. 683 (1948); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948).

** 80 Cong. Rec. 8102, 8140, 8224; *Corn Products Refining Co. et al.* v. *Federal Trade Commission*, 324 U. S. 726, 737 (1945).

business.* It is not sought by any other element of the Government or the business world—small or large.

> "The subcommittee heard testimony (under S. Res. 241) as to the effect of pricing practices of the Federal Trade Commission on industry on November 9, 10, 11, 12, 16, 17, 18, 19, 29 and 30, and December 6, 7, and 8, 1948. During that period of time 109 witnesses appeared before the subcommittee. Three attorneys for the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice testified as to their interpretation of the law on this subject. The other 105 witnesses all gave testimony as to the effect of those pricing policies on industry. *Required f. o. b. mill selling was supported by only two witnesses as being in the best interests of the country. One was an attorney for the Federal Trade Commission and the other an economist recommended to the subcommittee by the Commission. All other witnesses opposed required f. o. b. pricing.*" (Senate Sub-Committee's Interim Report, p. 27). (Emphasis supplied.)

The obvious result of compulsory f. o. b.-mill pricing will be, at least for standardized commodities, to "Balkanize" the United States and to establish throughout the nation freight tariff walls which will necessarily disintegrate our national market into innumerable small local markets in which regional monop-

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* The Wheeler Bill of 1936 (S. 4055, 74th Cong., 2d Sess.)—"The Anti-Basing Point Bill"—embodied the Federal Trade Commission's views and was rejected by Congress, as were other Commission views at the time of the enactment of the Robinson-Patman amendment to the Clayton Act.

oly rather than competition will be the order of the day.

The Federal Trade Commission seems to adopt the theory that because uniformity of prices can result from conspiracy, uniformity of prices must be eliminated, even if it result from competition. This concept displays shocking ignorance of the facts of economic life—for in dealing in standardized or homogeneous products, it is virtually inevitable that the more vigorous the competition the more likelihood there is of price uniformity throughout an entire competitive area. "Freight equalization" or "freight absorption" of any kind has been a potent weapon of business to meet price competition of competitors whose plants are located in more distant areas. Without the ability to absorb freight, there is generally, in the case of standardized products, no other method of meeting a competitor's price. Without the ability to meet price competition, old concerns will necessarily be forced to withdraw from distant markets and new concerns will be unable to expand beyond their own "natural freight advantage" territory.

Sellers distant from Market A will be unable to meet the price of, and compete with, the seller within Market A, and the latter will thus fall heir to a complete monopoly. The size of his monopoly will depend only on the geography of his particular industry, it being large if other sellers are far removed and smaller if other sellers are in more adjacent areas. But, large or small, an impenetrable monopoly area will be established. This untoward result is too fully and competently set forth in petitioners' brief to require further discussion here.

We must, however, point out that at least some of the startlingly disruptive effects of compulsory f. o. b.-mill pricing will be relocation of industry, its decentralization, and a windfall to large multi-outlet sellers. These will result from sellers' need to be present in each of the resultant monopoly areas to continue in competition in the market, and the inherent advantage obtained by sellers large enough to have, or acquire, numerous outlets usable as f. o. b. points. Only big business will, however, be able to comply with the costly demands of such a new economy. Small business lacks the capital necessary either to relocate, decentralize or acquire numerous warehouse outlets and will suffer staggering competitive and financial losses if forced to comply. This was recognized by the Senate subcommittee's interim report which states:

> "Walter B. Wooden, the Commission's principal avowed proponent of required f. o. b. mill selling, testified that there was no way to deprive a seller of the economic advantages of constructing and operating a chain of warehouses throughout the country. He testified that such a seller could ship his manufactured products to those local warehouses and sell out of each of those warehouses at f. o. b. warehouse prices. This would put a premium on a seller's financial ability to construct a chain of warehouses throughout the country, and be a corresponding impediment to the small-business man who does not have that financial power. It was also the testimony of Mr. Wooden that a seller owning a fleet of motor trucks could consider the cost of operating those trucks as an expense of doing business and average that cost over all of his customers. This

gives a substantial competitive advantage to the financially entrenched seller who is able to equip and operate a fleet of motor trucks, and a corresponding disadvantage to his smaller competitor who is financially unable to do so. The resulting effect upon the motor-carrier industry is, of course, obvious." (p. 20).

* * * *

"The financially entrenched producers of basic commodities can, if required to do so, relocate their plants at strategic locations permitting them to cope with any pricing practice. But their less wealthy competitors may not be able so to do. The testimony before the subcommittee is that the cost of constructing an integrated steel mill is 300 million dollars, 6 to 10 million dollars for a cement plant with minimum economic capacity, 20 million dollars for a plant to produce corn derivatives, 10 to 25 million dollars for a chemicals-producing plant, and 3 million dollars for a glass-container plant with minimum economic capacity. There are certainly few smaller business concerns in those industries that can afford extensive plant relocation at those levels for current construction costs." (p. 21).

* * * *

"The available evidence is all to the effect that the cost of industrial relocation and readjustment required by compulsory f. o. b. mill selling would be charged against, and payable by, both big and small business. But it appears that however unpleasant, big business will be able to withstand the payment of that bill. Unfortunately it seems that a large segment of small business will be unable to meet that financial obliga-

tion. *The burdens of required f. o. b. mill pricing appear to fall most heavily on small business.*" (p. 23). (Emphasis supplied.)

Further, in those industries producing standardized commodities where there are but a few sellers throughout the nation, their products will vary in price in every locality, dependent upon varying freight rates. In such a situation, the consumer, for whose benefit the anti-trust laws exist, will be punished or rewarded by the fortuitous circumstance of where he makes his home.

II.

The Commission has plainly exceeded its authority under the statute in finding a seller in violation of Section 5 simply because he uses a pricing practice being used by others in his industry.

If the order of the Federal Trade Commission here under review is affirmed by this Court, its decision must necessarily add to the confusion already prevalent throughout business. Confirmation of the order will mean that no seller of standardized commodities, no matter how independently he may act, will be free from fear of Federal Trade Commission prosecution or treble damage suits.

The objectionable portion of the Commission's order is premised on a wholly unrealistic theory of competition and results in placing the businessman in a veritable dilemma, for his innocence or guilt under the Federal Trade Commission Act will depend, not on his actions, but on the actions of others whom he cannot and may not control.

The Commission's erroneous premise is that there is something inherently wrong in a "conscious parallelism" in the pricing of homogeneous products whereby competing sellers employ similar sales methods—something equally as sinister as conspiracy and combination. The fallacy in the Commission's reasoning is twofold—(1) it fails to realize that the prices of sellers even in a theoretic and perfectly competitive economy naturally tend to similarity and to definite parallels,* and (2) it fails to understand that the intelligent seller in any economy must, merely to survive, know the prices at which competitors sell.

If there should be five manufacturers of a standardized commodity (such as cement, flour, glucose, steel, chemicals, lumber, glass, etc.) operating in a hypothetical and perfectly competitive market, their prices will inevitably tend toward uniformity without agreement, combination or conspiracy among the quintet. The resultant uniformity is inevitable and due solely to the fundamental principle of supply and demand. Should manufacturer No. 1 reduce his market price, the other four must similarly reduce their prices to maintain their share of the market. And if manufacturer No. 3 should reduce his price below manufacturer No. 1's new price, manufacturer No. 1 must follow suit simply to survive.

This inexorable law of the market place was obvious to the Senate subcommittee investigating this problem which noted that anything other than uni-

* The courts have recognized this elementary economic principle. See *United States* v. *American Linseed Co., et al.*, 275 F. 939, 942 (N. D. Ill., 1921), rev'd. on other grounds 262 U. S. 371, and, *United States* v. *Standard Oil Co. of New Jersey, et al.*, 47 F. (2d) 288, 316-17 (E. D. Mo., 1931).

formity of price in the sale of homogeneous products would indicate actionable manipulation of competition.

> "A cement dealer cannot pay more for the product of one producer than for the like product of other producers. A baker cannot economically pay more for the flour of one miller than for like flour of another miller. The candy manufacturer cannot pay more for the sugar or glucose of one refiner than for the like products of another. This same competitive condition applies to steel, chemicals, lumber, glass containers, and innumerable other commodities. *For such items of commerce real market competition among both buyers and sellers brings about price uniformity.* Significantly the Robinson-Patman Act was expressly designed to permit such dealers in competition with each other to purchase their requirements at the same price. The absence of price uniformity may even be an indication of inadequacy of competition among the sellers in homogeneous commodities. The evidence before the subcommittee is overwhelming that in such homogeneous commodities the business goes to the seller with the lowest price." (Senate Sub-Committee's Interim Report, p. 10). (Emphasis supplied.)

The second fallacy in the reasoning of the Federal Trade Commission consists of its desire to punish one of the assumed five manufacturers simply because, in altering his selling price, he knew and met the prices at which his four competitors were selling. To adopt such a *rationale* is to ignore the obvious: that only by diligent awareness of all details of the

market place—particularly price—can a seller of a standardized commodity in a truly competitive area continue in business.

Certainly, the Commission cannot believe that a seller's innocence or guilt must depend, not on his deeds, but on those of his competitors. Yet the Commission in this very case seeks to punish not only the last seller to meet competitive prices, but all other sellers whose prices are met, for the Commission's order here runs against an entire industry (including two members who were specifically excluded from the ambit of Count I concerning combination and conspiracy). Unless Paragraph V of the Federal Trade Commission's order is here set aside, a seller of a standardized commodity will only be assured of freedom from Commission action by employing deaf and blind salesmen, the only agents who will honestly be unable to hear or see, and thus not know, the prices of competitors as they tour the market place in quest of orders. Such a result was surely not intended.

If f. o. b.-mill pricing is to become "the law" in the marketing of homogeneous commodities, it must not be judicially adopted. Legislative action is required to effect such a basic upheaval in our economy. And the Court must be informed that Congressional consideration of this problem runs diametrically opposite to the current attitude of the Federal Trade Commission.

> "A buyer is interested primarily in the price he pays for a commodity when and at the point where he consumes or resells the commodity. His interest in f. o. b. mill prices is largely theoretical. But an f. o. b. mill price results in varying prices

the buyer has to pay for a given commodity in any given market whether or not the commodity is characterized by a high degree of homogenity. The required adoption of f. o. b mill-pricing policy fails to provide a freedom of choice by the consumer in the selection of the goods to be purchased. The relative quantity of goods purchased from any seller tends to fluctuate with a variety of variables including service, salesmanship, quality, ability to deliver, credit, and many other determinants of action including the relationship of the seller's price to other prices. Under the f. o. b. mill pricing philosophy, the consumer is not economically free to recognize any of these factors except price, unless he pays the penalty incident to higher freight costs for exercising such choice. This circumscribing of consumer choice by f. o. b. mill pricing fails to meet the first test of a competitive market. It deprives the buyer of a choice of sellers and compels him to purchase from the geographically closest supplier." (Senate Sub-Committee's Interim Report, p. 10).

Conclusion.

The untoward practical results of the Federal Trade Commission's order here under review require a reversal by this Court. We agree wholeheartedly with the following simple language of the Senate subcommittee's Interim Report on its current investigation into this very problem:

> "It seems that our competitive economy is best advanced by permitting as many sellers as is economically possible to compete for the business

of every buyer. This, it appears, can only be done when every seller, absent conspiracy or combination, is permitted to absorb any part or all of the cost of transportation in order to make his price at the customer's door competitive with that of other sellers located closer to the customer." (p. 14).

Wherefore, it is respectfully urged that Paragraph V of the order of the Federal Trade Commission here under review be set aside and the decision of the Court of Appeals for the Seventh Circuit affirming said order be reversed.

Respectfully submitted,

JULIUS HENRY COHEN,
Counsel for Chamber of Commerce of the State of New York, Amicus Curiae.

BURTON A. ZORN,
EDWIN P. KAUFMAN,
On the Brief.

APRIL 25, 1949.

Per Curiam Decisions.

No. 464. CLAYTON MARK & CO. ET AL. *v.* FEDERAL TRADE COMMISSION. Certiorari, 336 U. S. 902, to the United States Court of Appeals for the Seventh Circuit. Argued March 31, 1949. Decided April 25, 1949. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Albert R. Connelly* argued the cause for petitioners. With him on the brief were *Thurlow M. Gordon, Edward H. Green, Earl F. Reed, W. Denning Stewart* and *Milton H. Tucker. Charles H. Weston* argued the cause for respondent. With him on the brief were *Solicitor General Perlman, Assistant Attorney General Bergson, W. T. Kelley, Robert B. Dawkins* and *Walter B. Wooden. Julius Henry Cohen, Burton A. Zorn* and *Edwin P. Kaufman* filed a brief for the Chamber of Commerce of the State of New York, as *amicus curiae*, urging reversal. Reported below: 168 F. 2d 175.

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